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No. 83 -

IN THE

SUPREME COURT OF THE UNITED STATES

January Term, 1983

Supreme Court, U.S.
FILED
JAN 3 1983
ALEXANDER L. STEVAS
CLERK

JAMES DOUGLAS HILL,

Petitioner

-vs-

STATE OF FLORIDA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

1. Whether the Supreme Court of Florida, in affirming the death sentence in this case has adopted such broad and vague construction of the Florida Statute (Sec. 921.141 (b) (1) so as to violate the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. Whether warrantless electronic interception by police officers of conversations between Peticioner and an informant in Petitioner's enclosed backyard to his home violated his Fourth Amendnent rights under the Constitution of the United States.

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2. The Court should grant certiorari to consider whether the application of the Florida sentencing statute by the trial court and its affirmation by the Florida Supreme Court violated the Eighth and Fourteenth Amendments of the Constitution of the United States.	
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Petitioner, James Douglas Hill respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida is reported at _____Fla. ____. (___So. (1982) and is attached hereto as Appendix.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on July 15, 1982. A timely petition for rehearing was denied on October 5, 1982. An Order was made by Mr. Justice Powell on December 3, 1982 extending the time of the Petitioner to file a Petition for Certiorari to and including January 3, 1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1257(3), Petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States, which provides in relevant part:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On the afternoon of June 22, 1980, Rosa Lee Parker, age 12, went skating with Tina Deal, Tammy Deal, Russell Jackson, and the Petitioner(R 269). Rosa Lee Parker was wearing shorts and a blue shirt (R 267). After skating for approximately three hours, they all returned around 4:30 p.m. to the home of Tina and Tammy Deal (R 270). The Petitioner, whose motorcycle was at the Deal home, left shortly thereafter on the motorcycle along with Russell Jackson and returned minutes later alone (R 273). The Petitioner then proceeded to give Tina Deal, Tammy Deal, and Rosa Lee Parker short rides around the neighborhood on his motorcycle (R 274).

Thereafter, at approximately 5:00 p.m., Petitioner left on his motorcycle with Tina Deal and travelled to the home of Daniel Munson (R 274). He then travelled to his home, obtained a can of coffee, and then returned with Tina Deal to her home around 7:00 p.m. (R 275, 276).

Petitioner stayed at the Deal home for approximately another hour and then left on his motorcycle around 8:00 p.m. (R 277).

Rosa Lee Parker, who was still at the Deal home, then asked Tammy Deal to walk to a nearby schoolyard with her to play. Tammy Deal's mother would not permit this, and Rosa Lee Parker then left the Deal home at approximately 8:30 p.m. headed toward the schoolyard alone (R 302).

Daniel Munson testified that sometime around 9:00 p.m. on June 22, 1980, Petitioner came to his home on his motorcycle

with an unknown female passenger (R 348). The passenger was wearing long pants and a long-sleeved shirt (R 411). Since Daniel Munson would not let the Petitioner into his home, the Petitioner and his passenger left (R 350).

Munson testified that Petitioner again returned to his home later that same evening, around midnight or during the early morning hours of June 23, 1980, (R 351) and asked if Munson wanted to see a dead body (R 365).

The Petitioner, according to Munson, then took Munson to an uninhabited area nearby known as the "Pits" and showed Munson a dead body (R 365).

Gary Hill and Arnel Perkins testified that around 10:30 p.m. on June 22, 1980, they were sitting on the front porch of Gary Hill's home when they saw Daniel Munson come from the "Pits" area. Munson was in a hurry and he was carrying his shirt in his hand. When this occurred they both testified that the Petitioner was inside the Hill home, asleep on the floor (R 546).

During the late morning or early afternoon of Monday, June 23, 1980, Daniel Munson took Gary Hill and Russell Jackson to the "Pits" area and showed them the dead body which was identified as Rosa Lee Parker (R 556). This was initiated by Daniel Munson and no mention was made of the Petitioner at this time. While in the vicinity of the dead body, Munson picked up sunglasses and was going to keep them (R 557). Munson's testimony differed in that he stated that he concealed the sunglesses and only showed them to Gary Hill and Russell Jackson when he returned to his home, stating that he thought they belonged to the

Petitioner (R 371, 403).

During the evening of Tuesday, June 24, 1980, Munson again travelled to the "Pits" area and viewed the body with the Petitioner (R 375).

On Wednesday, June 25, 1980, Russell Jackson's father reported information to authorities regarding the dead body and the body was found and retrieved by authorities on June 25, 1980 (R 333). The body was found in a shallow grave of mud and hyacinths and it was partially exposed (R 448).

An autopsy was performed and the cause of death was found to be mechanical asphyxiation (R 321).

Daniel Munson was questioned regarding the death by reason of the fact that his name was mentioned by Russell Jackson. Munson eventually agreed to make a statement implicating the Petitioner in the crime.

On July 2, 1980, the Hillsborough County Sheriff's Office persuaded Munson to go to the home of the Petitioner, the prime suspect and target, to elicit statements from him regarding the death of Rosa Lee Parker. Certain promises were made to Munson regarding pending criminal charges in exchange for his cooperation. Specifically, he was promised that the State would drop a pending burglary charge, that the State would take care of any pending parole violations, and that he would not be charged as an accessory to the crime of murder involving Rosa Lee Parker (R 377).

An electronic transmitter was concealed on the person of Daniel Munson and he was directed to go to the home of the

Petitioner and attempt to draw him outside and talk to him. Officers were staioned nearby in two mobile vans with electronic receivers and recorders (R 378).

Munson travelled to Petitioner's home and, after talking with Petitioner inside his house, persuaded the Petitioner to walk out into the fenced backyard of the Petitioner's home to talk privately (R 490, 500, 860, 861). The conversation between Petitioner and Daniel Munson was recorded and the tape recording along with the testimony of Munson and the officers who operated the receivers and made the recordings were used at trial over Petitioner's objections.

It is agreed that none of the investigating officers involved obtained any intercept warrant pursuant to Florida Statute (934) prior to the electronic recordings obtained on July 1, 1980, or that there existed such emergency circumstances that would negate the necessity of obtaining such an intercept warrant (R827).

A Motion to suppress the tape recording, its transcript and the testimony of the officers regarding conversations between Petitioner and Daniel Munson occurring on July 1, 1980, overheard by means of electronic devices was made prior to trial. It was timely asserted that the electronic interception was obtained in violation of Petitioner's right to privacy against electronic intrusion guaranteed by the Constitution of the United States (R 12, 13).

The Trial Court denied the motion. It was of the view that the guaranteed right of privacy from electronic intrusion did not extend to the subject enclosed backyard, but was restricted

to the four walls of Petitioner's home (R 861, 863).

The Trial Court in denying the suppression motion found a difference to support its denial in the reasonable expectation of privacy in the backyard.

> "If you are inside the house it is [referring to the expectation of privacy] but if you are out in the backyard it is not" [expectation of privacy] (R 863).

and at R 872:

> "I do not think there is a reasonable expectation of privacy in the back yard."

The Assistant Attorney General in his summation to the jury conceded "that promises were made to Danny Munson" who was the informant, and that "Danny Munson, Russell Jackson, held the keys to this case." (R 585), and at R 586: "One of the most important pieces of evidence in this case besides all the other testimony that you heard that really brings everything together is the body bug that was put on Danny Munson."

The Attorney General graphically described Munson, the informant:

> "He is a criminal. He wants to stay out of prison. He's been there before." (R 610).

The critical significance of the tape in this case was emphasized by the prosecutor in summation to the jury (R 625).

> "Ladies and gentlemen, you can disbelieve everybody in this trial, but you cannot dispute the language on this tape because it comes from Hill's own mouth. That does not leave any doubt in your mind."

The critical part that the tape played in the jury's

deliberation was graphically shown when after retiring, the jury returned with a question:

> THE COURT: Ladies and gentlemen of the jury. I understand you have a question.
>
> JUROR #9: Yes, sir, Your Honor. We request that we would like to listen to the tape again, please, in its entirety, without any interruptions."
>
> (The tape was played)

The jury then retired again at 12:55 p.m. and returned to the courtroom at 2 p.m. with its guilty verdict of first degree murder.

The dissenting opinion in the Court below in finding reversible error in the introduction of the tapes of conversation between Munson and Hill stressed its importance in the trial.

> "We cannot say that the admission of the tape here was harmless. It played a significant role in the trial and was frequently discussed by witnesses and the prosecutor. Information gained from it was used in rebuttal." (See Appendix)

Upon the return by the jury of the guilty verdict, the sentencing procedure prescribed by Florida statute in first degree murder cases was undertaken by the Court. (F.S. 921.141)

The Trial Judge read to the jury then functioning in an advistory capacity the statutory enumerated aggravating and mitigating factors to be considered by them in reaching their recommendation on either life or death sentences (R 703). The Trial Court furnished no explanation in lay language of the meaning of the various technical terms used by the statute. The jury after its deliberation recommended to the Court the imposition of the death penalty (R 709) and the Court immediately stated that it concurred in the jury's recommendation.

The Court thereafter made its formal required findings in entering the judgment and sentence.

Subdivision H of the statute prescribes as one of the aggravating factors to be considered, the following:

> "the capital felony was especially heinous, atrocious or cruel."

Subdivision I of the statute, enumerating a different and other aggravating factor to be considered is as follows:

> "The capital felony was homicide and was committed in a cold calculated, and premeditated manner without any pretense or moral or legal justification."

The Trial Court then stated in its findings:

"H and I will be considered together." (R 64).

The Court then proceeded to discuss together the same testimony to support both of the above aggravating factors.

The Court found one mitigating circumstance; no history of prior criminal activity on the part of the Petitioner, and having employed the above method of reaching two aggravating factors, found that the aggravating factors outweighed the mitigating circumstances and imposed the death sentence.

The Florida Supreme Court rejected both constitutional claims of Petitioner, holding that:

> "the instant tape recording was of a conversation which occurred in appellant's backyard, not in the home."

It refused to extend its holding in State vs. Sarmiento, 397 So. 2nd 643 (Fla. 1981) where it held that a tape recording of a conversation in a home was an unconstitutional intrusion. It also refused to accept its similar holding on Odom v. State,

403 So. 2nd 936 (Fla. 1981) "because that interception was in the home."

And although the Florida Supreme Court found that

> "the trial court considered both aggravating factors together"

[referring to the sentencing procedure] it nevertheless found that the applicable statute was applied properly by the sentencing Judge.

See Appendix)

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW.

THE TAPES

Prior to the trial, the Petitioner filed a Motion, dated October 13, 1980, seeking to suppress the tape recordings of the conversation of July 1, 1980 between the Petitioner and Danny Munson, and any transcript of said tape recording and any testimony by the police concerning the conversation between the Petitioner and Munson on that date, such conversation heard by the use of electronic transmission device placed on Munson and received by an electronic receiver (R 12). Said Motion asserted that:

> "such tape recording was obtained in violation of Petitioner's right to ... privacy as guaranteed by the ... United States Constitution and the Constitution of the State of Florida."

It further argued that the transcript of the tape recording was likewise obtained "in violation of the Petitioner's right to privacy guaranteed by the above named provisions of the United States Constitution and the Constitution of the State of Florida," and that any testimony by the officers regarding conversation likewise would be in violation of Petitioner's rights

guaranteed by the United States Constitution (R 13).

A hearing on the suppression motion was conducted by the Trial Court. The constitutional question was again raised by the Petitioner (R 860).

> "MR. YOUNG: Yes. And search in the backyard. The backyard here is a fenced yard. It's away from the street. It's clothed with the same expectation of privacy. The fellow, Munson, came to Hill's house. They walk into the house. Munson engages in conversation. They go out in the backyard. He said, 'Let's go out in the backyard.' Hill follows him to the backyard. To me, I don't see how that makes any difference being either in the house or right on the back porch or in the backyard. The whole issue is the expectation of privacy. There is a constitutional expectation of privacy."

The Court was of the view that the reasonable expectation of privacy in a fenced backyard was not the same as in a home because a neighbor might be "on the other side of the fence eavesdropping", and then continued and stated:

> "Maybe I am wrong in light of what you just said, but I think there is a difference in the reasonable expectation of privacy." (R 861).

The Court, troubled by the question raised by the Petitioner finally posed the question which remained unanswered.

> "THE COURT: My question is: Has the United States Supreme Court said, apparently they -- has the United States Supreme Court said you can go into a private home with the police officer or agent of the police and bug that person, transcribe and send out of the home over a recording device a conversation? They haven't addressed that? What does Katz talk about?" R 869

Nevertheless, the Court denied the Motion to Suppress (R 872).

The Petitioner in his brief to the Court below raised the constitutional question presented to this Court as follows:

"In conclusion, this Court has before it an opportunity to unequivocally state that the rights of citizens of the State of Florida against self-incrimination and against unlawful search and seizure by means of electronic eavesdropping will not be abridged when the circumstances are such that an individual has a reasonable expectation of privacy when having a conversation with a third party and this conversation takes place within an area reasonably protected by the Constitution of the State of Florida as well as the United States Constitution." (P. 6, Reply brief of Petitioner).

Petitioner in his brief below pointed out that there was no evidence at the trial to show that there was not sufficient time for the Sheriff or the State to obtain the warrant authorizing the interception of the conversation. (p. 9).

Petitioner in the same brief noted too that there was "no testimony that the conversations could be overheard by anyone other than the participants, both while they were in the home of the Appellant and in the back yard of the Appellant, without the use of electronic transmitting and receiving devices." (p. 11)

Finally, Petitioner urged the Court below that "It is the Appellant's contention that he had the same reasonable expectation of privacy in his back yard as well as within the home based upon the facts of this case." (p. 13).

Both the trial Court and the Court below rejected the constitutional issue raised by Petitioner.

THE SENTENCING PROCEDURE

The Petitioner in the Court below raised the unconstitutional application of the Florida sentencing statute (F. S. Sec. 921.14) (pp. 18, 19). Petitioner again raised it in his reply brief to the Court below at page 7.

Petitioner argued before the Court below that in applying the sentencing statute the trial judge considered these two aggravating circumstances together and based his decision upon the same evidence and testimony for both circumstances. Since it is well settled that aggravating circumstances in a murder prosecution must be proven beyond a reasonable doubt, Foster v. State, 369 So. 2nd 928 (Fla. 1979), it is incumbent upon the trial Judge to make a distinction in the evidence and testimony as it applies to each particular aggravating circumstance or otherwise the purpose of denoting separate and distinct aggravating circumstances in the Statute is a nullity.

It would appear from the trial Judge's written findings as to aggravating and mitigating circumstances (R 61 - R 78) that he failed to delineate specific evidence to support each particular circumstance which had the effect of creating two aggravating circumstances out of the same evidence where only one, if any, would exist. This is essential in this cause, due to the fact that only two aggravating circumstances were found to exist and one mitigating circumstance was found to exist.

It is well settled that a trial Judge cannot double up on aggravating circumstances. Provence v. State, 337 So. 2nd

783 (Fla. 1976). See also Gafford v. State, 387 So. 2nd 333 (Fla. 1980).

One of the Justices of the Court below dissented from the imposition of the death sentence, disagreeing that either of these elements (the aggravating circumstances) was proven beyond a reasonable doubt.

In Gardner this Court in vacating the death sentence imposed by the trial Judge after the jury had recommended a life sentence reminded us "that any decision to impose the death sentence be based on reason rather than caprice and emotion." (P. 358 of 430 U.S. and P. 402 of 51 L. Ed. 2nd).

This case presents to this Court a cursory and rubber-stamp review by the Florida Supreme Court. Such review the Petitioner urges this Court to consider does not satisfy the hopes and expectations expressed in Proffitt and the promise made by Florida in its statute.

It is suggested by the Petitioner that the device used by the trial Judge of arbitrarily combining aggravating factors and then counting them as two factors is unconstitutional, offensive as the trial Judge's use of a confidential report in Gardner. This Court should consider whether the denial of due process occurred in this case as it did in Gardner.

This Court too should consider whether the sentencing procedure invoked by the trial Court and approved by the Court below created the very situation sought to be obviated in Gregg; when the death penalty should not be inflicted in an arbitrary and

capricious manner.

By the granting of this Petition, this Court could furnish guidance to Florida as to whether the sentencing technique used in this case is constitutionally impermissible.

Justice Marshall, in Godfrey summarizes the numerous cases where death sentences were imposed, and this Court after granting certiorari to consider the sentencing procedures were vacated because they were found to be fraught with Eighth or Fourteenth Amendment defects. (See p. 413 of 64 Fed. 2nd, p. 439 of 446 U. S.)

The Court by granting this Petition would then be able to consider whether this is not yet another case of non-compliance with this Court's strictures and hopes expressed in Gregg and the failure of Florida to meet the standards set forth in this Statute and approved in Proffitt.

REASONS FOR GRANTING THE WRIT:

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE DENIAL OF THE MOTION TO SUPPRESS TO PRECLUDE THE ADMISSIBILITY OF THE ELECTRONIC TAPES WAS A VIOLATION OF THE FOURTH AMENDMENT PROTECTION AGAINST UNREASONABLE WARRANTLESS SEARCH AND SEIZURE, PROVIDED BY THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Trial Judge, in denying the Motion to Suppress was of the mistaken view that it was the "place" that gave rise to the Fourth Amendment protection, rather than the expectation of privacy and the reasonableness of such expectation. The Trial Judge, as stated previously, question (R 869) whether this Court ever considered the setting in this case, and whether Katz was instructive or helpful, referring, of course to Katz v. U. S., 389 U. S. 347, 88 Supreme Court, 507 (L. ed. 2nd 576), (1967).

Again, the Court below in affirming the conviction and the death sentence predicated, as we have shown in this Petition, primarily on the tape, when faced with the question whether the right of privacy could extend to the subject enclosed fenced back-yard, refused to extend its ruling in Sarmiento v. State, 397 So. 2nd 643 (1981) and Odom v. State, 403 So. 2nd 936 (1981) beyond protecting the four walls of the home against warrantless intrusion by electronic interception to a backyard. (See Appendix)

At the Suppression hearing, petitioner's trial counsel urged upon the Trial Court, Morsman v. State of Florida, 394 So. 2nd 408 (1981) where the Court below suppressed marijuana taken by the police from unfenced backyard without warrant.

At page 409:

> "However, the backyard of a residence is more private because passerby cannot generally view this area. In Fixel v. Wainwright, 492 F. 2d 480 (5th Cir. 1974) this concept was extended to the backyard of a four-unit apartment building. Although not as exclusive as the backyard of a private residence, the backyard was not a common passageway normally used by tenants or businessmen who might approach the tenants. Accord, Olivera v. State, 315 So. 2d 487, 490 (Fla. 2d DCA 1975.)"

And continuing on the same page, the Court below held:

> "When there is no legal right to observe an article of contraband, it is illegal to seize the article. Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

Even though the seizure was from an open area, the Court concluded in Morsman, at page 410: (101 Sup. Ct. 3066)

> "The shortcut taken by skipping the application for a warrant was unjustified and violated Defendant's Fourth Amendment right to be free from an unreasonable search and seizure."

The State of Florida, feeling aggrieved at the result in Morsman, filed a Petition for Certiorari in this Court, but it was denied in June, 1981.

The Court below, in affirming Morsman, cited Fixel v. Wainwright, 492 Fed. 2nd 480 (5th Cir. 1974). In Fixel the Court below had affirmed the conviction, and a petition for a writ of habeas corpus was dismissed by the District Court. On appeal, the Circuit Court reversed. The issue was whether the seizure in the back-yard was offensive to Fourth Amendment protection.

In Fixel the Court cited various Circuit Court holdings that the backyard of a house was a constitutionally protected area.

"The Fourth Amendment's protection, however, extends further than just the walls of the physical structure of the home itself. The area immediately surrounding and closely related to the dwelling is also entitled to the Fourth Amendment's protection. In defining the surrounding area entitled to such protection, the courts historically have found helpful the common law concept of curtilage, meaning 'yard, courtyard or other piece of ground included within the fence surrounding a dwelling house.' Marullo v. United States, 328 F. 2d 361, 363 (5th Cir. 1964) QUOTING Webster's Third New International Dictionary (1962). SEE United States v. Molkenbur, 430 F. 2d 563, 566 (8th Cir. 1970); United States v. Davis, 423 F. 2d 974, 977-978 (5th Cir. 1970); United States ex rel. Boyance v. Myers, 398 F. 2d 896, 899 (3rd Cir. 1968); United States v. Mullin, 329 F 2d 295, 298 (4th Cir. 1964). When officers have physically invaded this protected area, either to seize evidence or to obtain a view of legal activities, we have readily condemned such an invasion as violative of the Fourth Amendment. United States v. Davis, supra, 423 F. 2d at 977; Texas v. Gonzales, 388 F.2d 145, 147-148 (5th Cir. 1968); Brock v. United States, 223 F.2d 681, 685 (5th Cir. 1955); SEE Gil v. Beto, 440 F. 2d 666, 667 (5th Cir. 1971)." (See p. 483)

But none of the cases summarized by the Court in Fixel reached the question posed by this Petition, -- did the warrantless electronic intrusion of private conversation in Petitioner's enclosed back yard in the setting described, constitute a violation of the Fourth Amendment rights?

At the trial it appeared that the informant, Munson, drew Petitioner from his family group present within his home, to his enclosed backyard for such private conversations with the Petitioner as informant was instructed by the police. (R 417). Petitioner urged below, and urges again that Petitioner exhibited an expectation of privacy in an area that society is prepared to recognize as reasonable.

Petitioner has met the requisite test and standards enabling him to such protection, as set forth in Smith v. Maryland, 442 U. S. 735, 99 S. Ct. 2577, and in Katz v. United States, supra.

This Court while permitting electronic intrusion in an unprotected area has "insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area." Lopez v. United States, 373 U. S. 427, 10 L. ed. 2nd. 462, 470.

Lopez refers us to Silverman v. United States, 365 US 505, 5 L ed 2d 734, 81 S Ct 679 (1961) where this Court held electronic intrusion a deprivation of Fourth Amendment rights. In that case there was an electronic intrusion of petitioner's conversations in his home and office.

Justice Harlan, in his concurring opinion in Katz, supra, confirmed the holding in Silverman when he stated that Silverman instructs us:

> "that eavesdropping accomplished by means of an electronic device that penetrated the premises occupied by petitioner was a violation of the Fourth Amendment. That case established the interception of conversations reasonably intended to be private could constitute a 'search and seizure,' and that the examination or taking of physical property was not required."

(at page 588 of L. ed. 2nd)

We find our case no different than Silverman, discussed by Justice Harlan, except that our Petitioner's private conversation occurred in his enclosed backyard, which were electronically intercepted by the police.

Curiously, the Court below, while perceiving that Petitioner's Fourth Amendment rights do not apply to electronic

interception outside the four walls of his home, has no difficulty in applying the Fourth Amendment to an open area when warrantless physical seizure occurs. (see e.g. State of Florida v. Brady, 407 So. 2nd 1093 (1981). The Court below in Brady had no difficulty when it came to physical seizure to find that the "open field" doctrine announced by this Court in Hester v. United States, 265 U.S. 57, 44 S. Ct. 445, 68 L. ed. 898 (1924) did not apply.

But unless this Court grants the Petition for Certiorari on this significant constitutional question, the Court below will have snuffed out Petitioner's Fourth Amendment rights as well as his life.

THE DEATH SENTENCE

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE APPLICATION OF THE FLORIDA SENTENCING STATUTE BY THE TRIAL COURT AND ITS AFFIRMATION BY THE FLORIDA SUPREME COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

As this Court has repeatedly declared, both the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment require that the decision to impose a sentence of death must be a reasoned and rational determination. In Gregg v. Georgia, 428 U. S. 153 (1976), the Court upheld Georgia's death penalty statute against Eighth Amendment challenge in part because of the express statutory mandate that the state supreme court review every death sentence to determine whether it "was imposed under the influence of passion, prejudice, or any other arbitrary factors." Ga. Code Ann. Sec. 27-2537 (c) (1); see Gregg v. Georgia, supra, 428 U. S. at 198. In Gardner v. Florida, 430 U. S. 349, 358 (1977), the Court stressed that:

> "It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

The Court reiterated this principle in Godfrey v. Georgia, 446 U. S. 420 (1980), in which the Court reversed a death sentence which could not be said to be "based on reason rather than caprice or emotion." In earlier capital cases, the Court similarly paid careful heed to the constitutional concern that the decision to extinguish the life of an individual must not be the product of passion or emotion.

This Petition presents to the Court the opportunity to consider whether even where the underlying statute has been found on its face to meet the constitutional standards now set out by this Court (Proffitt v. State of Florida, 428 U. S. 242, 49 L. Ed. 2d 913, 96 Sup. Ct. 2960 (1976) yet, its application may face the same fatal difficulties found to be present in Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346 (1974).

The Florida statute, which this Court in Proffitt, supra found to pass constitutional muster contains separate and specific aggravating and mitigating factors, each to be considered separately by the sentencing Judge. The proof as to each factor must be separate and distinct and proven beyond a reasonable doubt. (Foster v. State, 369 So. 2nd 938 (Fla. 1979).

The Florida Legislature in enacting the statute to meet the standards prescribed in Furman, supra, wanted to be certain that the individual aggravating circumstances would outweigh the mitigating circumstances in order to justify the imposition of the death penalty.

Instead, the sentencing Judge in this case combined two of the aggravating factors described by the statute (H and I) and then used the same evidence to support both factors. He then concluded that the two statutory aggravating factors outweighed the one mitigating factor (no prior criminal history) and imposed the death sentence. The Court exercised its discretion,

unauthorized by the statute, and perceived that it had responsibly and constitutionally discharged its sentencing function.

The lower Court approved the method in which the trial Judge applied the statute. When the Court below was presented with the issue as to whether the trial court erred in improperly doubling the aggravating circumstances, it should have rejected such a vague and dubious application of the death sentence. Especially is this so in light of the decision in cases such as Provence v. State, supra, where the Court below vacated a death sentence imposed by the sentencing Judge and stated: (at p 786)

> "But Section 921.141, Florida Statutes, intended as it was to meet the constitutional infirmity of capital sentencing procedures explored in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) is designed to limit the unbridled exercise of judicial discretion in cases where the ultimate penalty is possible."

The lower Court's ambiguous construction of the relevant provisions of the statute opens the door to undue discretion to the trial court and creates intolerable unconstitutional dangers and arbitrariness and caprice.

In Gregg, supra, this Court expected that the statutes enacted by the various states would eliminate the very risk and danger here present, and when this Court approved the Florida statute in Proffitt, supra, it expected that the application of the statute would meet the test and be applied

in a precise and evenhanded manner.

Yet this advisory jury's function was performed by instructions given to it in the form of the bare words of the statute, words that could be understood to apply to any murder. Then the sentencing Judge used the statute as he saw fit in an unbridled manner, combining aggravating factors since these could not be sustained on an independent and separate basis. The trial Judge did that in order to corroborate and confirm his comments to the advisory jury immediately upon its return with their recommendation of the death penalty (R 709):

> "The Court fully concurs in the verdict of guilty and fully concurs in the jury's recommendation of death." (R 10).

This concurrence was even before the sentencing Judge reviewed the record, reflected upon the evidence and applied the statute.

The question presented by this Petition is -- did the Court below apply the Florida statute in an arbitrary and capricious manner so that the imposition of the death penalty to this Petitioner is an invasion of his Eighth and Fourteenth Amendment rights.

Even if the objective goal of Gregg is satisfied by the Florida statute, yet this Court ought to consider whether there is here present yet another illustration where the sentencing procedure allows unbridled discretion.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

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